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No. 91-1860

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DOUGLAS SCOTT MICKEY
Petitioner,

v.

STATE OF CALIFORNIA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the California Supreme Court conducted an adequate evaluation for any prejudice resulting from errors of state law in the penalty phase of petitioner's capital trial.

2. Whether the California Supreme Court violated petitioner's federal constitutional rights by rejecting sua sponte some claims in the appeal from his death penalty judgment on the ground of state procedural default.

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OPINION BELOW

The opinion of the California Supreme Court is reported at 54 Cal.3d 612, 286 Cal.Rptr. 801 (1991). It is set forth at Appendix A to the petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Art. VI, section 11 of the California Constitution; California Government Code section 68081; and California Penal Code sections 190.3 and 1239(b). The various provisions are set forth in the petition at pages 3-4.

STATEMENT OF THE CASE

On July 19, 1983, a jury in San Mateo County[1/] convicted petitioner of two first degree murders, Cal. Pen. Code § 187, with special circumstance findings as to each murder of intentional killing for financial gain, Pen. Code § 190.2(a)(1); conviction of more than one murder in the same proceeding, Pen. Code § 190.2(a)(3); killing during the commission of robbery, Pen. Code § 190.2(a)(17)(i); and killing during the commission of burglary, Pen. Code § 190.2(a)(17)(vii). On August 26, 1983, the same jury returned a sentence of death. Judgment was pronounced on September 23, 1983.

On automatic appeal the California Supreme Court reversed the financial gain special circumstances and one of the multiple murder special circumstances. It otherwise affirmed the convictions and the death sentence,

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1. The case was transferred from Placer County to San Mateo County on a change of venue.

in an opinion filed on October 31, 1991. *People v. Mickey*, 54 Cal.3d 612, 286 Cal.Rptr. 801 (1991). The court denied rehearing on January 8, 1992.

STATEMENT OF FACTS

The opinion of the California Supreme Court fairly summarizes the facts developed at petitioner's trial:

"**A. Guilt Phase**

"At the guilt phase, the People introduced substantial evidence, both testimonial and physical, to prove the murder charges and special circumstance allegations. The evidence featured certain extrajudicial statements by defendant to persons including family members, friends, and acquaintances, the police, and a fellow inmate in jail. It also included testimony by Edward Rogers, who was an accomplice and took the stand under a grant of immunity. The tale told is long and detailed. Its substance is as follows.

"In September 1980 defendant was married to Lieutenant Allison W. Mickey, a Air Force nurse, and resided with her and her two children in housing at Yokota Air Base in Japan. The couple was experiencing difficulties in their financial situation and consequent distress in their personal relationship. By the time of trial, their marriage had been dissolved.

"About September 17, 1980, defendant returned to California, flying into Travis Air Base in Solano County. During much of his time in the state, he

stayed with Rogers, a longtime friend, in Concord; both were about 31 years of age.

"Defendant disclosed several reasons for his visit -- including, primarily, an intent to execute a plan to rob and murder a man in Placer County and then possibly to travel to Alaska to kill his wife's former husband for the proceeds of a life insurance policy of which she and/or her children were beneficiaries.

"The man in Placer County was Eric Lee Hanson. He dealt in marijuana and hashish, and also cultivated the former. Hanson lived with his lover, Catherine Blount, in a house in the rural community of Ophir; Hoehne lived there as well, but at the time relevant here slept in a tent some distance away in order to guard the marijuana crop; Hanson was about 29 years old, Blount 18, and Hoehne 24.

"Defendant had been a friend of Hanson for several years, but bore secret grievances against him and desired revenge. Years earlier, defendant believed, Hanson had stolen certain items belonging to him and his family. In 1979 defendant raided Hanson's marijuana crop in retaliation. After his arrival in California, he retrieved the drug from the place at which he had hidden it, and began to consume it continually -- apparently together with alcohol. He discussed his scheme against Hanson with Rogers and took steps to accomplish his objective.

"On September 22, 1980, defendant traveled to Hanson's home in a car he had borrowed from Rogers in order to carry out his plan. He arrived about 11 p.m. He was armed with a rifle belonging to Rogers, which he had fitted with a homemade silencer.

Blount was alone in the house; Hanson and Hoehne were out on the property. Blount invited defendant in. Hanson soon returned. Defendant did not do the deed -- apparently because Hoehne learned of his presence and could therefore link him to whatever might happen. He visited with Hanson and Blount, stayed overnight, and left the next day. During his time at the property, defendant observed Hanson counting 'a good size stack of money'; he attempted to sell him some of the marijuana he had stolen the year before, but was unsuccessful.

"On September 28, 1980, defendant again traveled to Hanson's home in order to carry out his plan, this time accompanied by Rogers in a pickup truck belonging to the latter. The pair established a rendezvous point at a public telephone booth near a restaurant a few miles from the house; defendant took down the number of that telephone and gave Rogers the number of Hanson's. They drove to the property. Rogers left defendant off. The time was near midnight. Defendant was armed with, at least, a knife belonging to himself and a pistol belonging to Rogers. Hanson and Blount were alone in the house; Hoehne was in his tent. Hanson and Blount greeted defendant at the door and invited him in.

"During the earliest hours of September 29, 1980, evidently after Hanson and Blount went to sleep, defendant killed the couple: he bludgeoned Hanson with a baseball bat and slit his throat from ear to ear down to the spinal cord; he stabbed Blount seven times in the chest in a close pattern, piercing her heart with three of the blows. Immediately thereafter, he removed

a substantial quantity of property from the house, loaded it into a black Volkswagen Karmann Ghia that belonged to Hanson, and departed; he left no fingerprints behind. He arrived at the rendezvous point. Rogers followed in the pickup truck. Some distance away, with Rogers' help he transferred the goods to the truck and then wiped the Volkswagen clean of fingerprints and abandoned it there. Defendant said he wanted to go back and burn the house; Rogers dissuaded him, declaring one should never return to the scene of the crime. The pair drove back to Concord. Once there, defendant sutured close with needle and thread a gaping injury he had sustained to his left leg during the events at Hanson's home. The pair proceeded to stash the stolen goods.

"On September 30, 1980, defendant fled this country from Travis Air Force Base, stopped over in Hawaii, and arrived at Yokota Air Force Base in Japan on October 3. On October 2 Rogers made a statement to officers at the Placer County Sheriff's Department implicating himself and defendant in the deeds described above. Defendant was subsequently arrested in Japan and was eventually returned to this state.

"In his defense, defendant introduced little evidence, and did not himself take the stand. It was his basic position that the People failed to sustain their burden to prove him guilty beyond a reasonable doubt as to any applicable mental state required for criminal liability. More positively, he claimed that in committing the acts in question he acted in self-defense or under voluntary intoxication and/or diminished capacity as a

result of voluntary intoxication.[1/] For his defense, he relied on certain of his extrajudicial statements introduced by the People, which if believed could support his position.

"B. **Penalty Phase**

"At the penalty phase, the People introduced evidence in aggravation that they themselves characterized as 'very limited.' Specifically, they attempted to prove that on four occasions, in the course of domestic disputes involving his first and second wives, defendant engaged in other violent criminal activity, viz., assault and/or battery.

"By contrast, defendant introduced substantial evidence in mitigation.

"Family members, friends, and acquaintances narrated a story of defendant's background and character. Its main points are these.

"Defendant's parents, Robert and Dorothy Mickey, were married in 1946; defendant's brother Ronald was born in 1947, defendant himself in 1948; the family lived in the environs of Placer and Nevada Counties. Defendant was a good, loving, and hardworking child and youth.

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[1] The defense of diminished capacity, which was abolished by statute as of January 1, 1982 (Stats. 1981, ch. 404, §§ 2, 4, pp. 1591-1592, amending Pen. Code, § 22 and adding Pen. Code, § 28), remains available for crimes -- such as the present -- committed before that date. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1240-1241 [278 Cal.Rptr 640, 805 P.2d 899].)

"Tragedy, however, touched defendant's life. When he was about five years of age, a half brother named Randall was killed in an automobile accident. When defendant was about 17, his mother died in an automobile crash -- possibly by accident and possibly by suicide. He had been very close to her, and felt her loss deeply. He turned to alcohol to deaden the pain. Not long afterward, his maternal grandfather died. A little later, his brother Ronald killed himself.

"Defendant began to drift through life, moving from job to job, place to place, marriage to marriage. He developed a taste for various illicit substances, including marijuana, hashish, mescaline, psilocybin, hallucinogenic mushrooms, phencyclidine (PCP), and lysergic acid diethylamide (LSD). He also developed an interest in eastern religions. He soon met Hanson, who shared his taste and interest. The two men quickly became close friends. They engaged in unusual behavior under the influence of the illicit substances they ingested. For example, they 'would get naked and admire . . . the strength in their bodies. . . . And they would talk about philosophies and run through the hills like deer . . . .'

"With the exception of the crimes of which he had been convicted and the other unadjudicated violent criminal activity, defendant was nonviolent, and would likely adapt well to life in prison.

"Two experts gave opinions bearing on defendant's mental state at the time of the crimes. Each testified in substance that at the critical time, defendant did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to

the requirements of law -- or at best, any capacity he may have had was 'severely' or 'significantly' impaired. Each identified two causes of defendant's condition: long-term and heavy 'polysubstance' abuse and psychopathology. Each discovered a delusional system that was apparently based on writings of an author named Carlos Castaneda, who was then popular in the drug culture. In that system, as one of the experts stated in pertinent part, Hanson was the master and defendant the apprentice; defendant wished to become a 'spiritual warrior'; at one point, Hanson began to 'rob[]' defendant of the 'power' he needed to achieve his goal; defendant had to kill Hanson to get his 'power' back -- and did so. Each expert's opinion was based in large part on information provided by defendant himself.

"In rebuttal, the People introduced evidence in the form of opinion by an expert to counter the opinions of defendant's experts. The opinion of the People's expert was based on information coming from sources including defendant as well as his family, friends, acquaintances, and others. The People's expert contradicted defendant's." 54 Cal.3d at 637-641, 286 Cal.Rptr. at 808-810.

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ARGUMENT

I.

THE CALIFORNIA SUPREME COURT CONDUCTED A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS WITH RESPECT TO THE JURY'S CONSIDERATION OF REVERSED SPECIAL CIRCUMSTANCE FINDINGS AND INADMISSIBLE AGGRAVATING EVIDENCE DURING PENALTY DELIBERATIONS.

In its review on direct appeal of petitioner's death judgment, the California Supreme Court reversed three of the jury's eight special circumstances findings, 54 Cal.3d at 678-679, 286 Cal.Rptr. at 835, and concluded that evidence of assaultive behavior by petitioner on two of his former wives, offered as aggravation in the penalty phase, was improperly admitted. 54 Cal.3d at 683-685, 286 Cal.Rptr. at 838-840. The errors related solely to issues of state law, and the court found that neither was prejudicial on the penalty determination. 54 Cal.3d at 684, 703, 286 Cal.Rptr. at 839, 851. Petitioner argues in reliance upon this Court's recent opinion in *Stringer v. Black*, 112 S.Ct. 1130 (1992), that the state court's harmless error analysis was constitutionally flawed. His argument misinterprets *Stringer* and demonstrates a fundamental misunderstanding of California's death penalty statutes.

In *Stringer*, this Court examined a Mississippi death judgment. As explained in the opinion, a Mississippi defendant who is convicted of a capital murder -- in that case a killing during a robbery or burglary -- proceeds to a sentencing phase. If the jury finds at least one of eight statutory aggravating factors, it must then determine whether the factor or factors are not outweighed by any mitigating factors before it may impose a death sentence. 112 S.Ct. at 1134. Although the state supreme court upheld all three aggravating factors in affirming the judgment, subsequent decisions of this Court, *see Clemons v. Mississippi*, 494 U.S. 738 (1990), demonstrated that the "heinous, atrocious or cruel" factor was unconstitutionally vague. Given the significance attached by the state court to aggravating factors in the weighing phase of a Mississippi capital sentencing hearing, this Court found that the use of "a vague or imprecise" factor "at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." 112 S.Ct. at 1140. The reviewing court in a "weighing state" may not simply assume that an invalid aggravating factor did not infect the weighing process. 112 S.Ct. at 1137. The Court recently emphasized that the state opinion must contain "explicit language signifying" the action taken by the reviewing court. *Sochor v. Florida*, 60 LW 4486, 4489 (1992).

Petitioner notes, correctly, that California is a weighing state, but then, incorrectly, equates "special circumstances" with "aggravating factors." He also, again incorrectly, contends that the California Supreme Court undertakes no harmless error analysis when it finds error in the admission of aggravating evidence at the penalty

phase. A brief review of California's statutory scheme and of the opinion in this case demonstrates the flaws in petitioner's analysis.

Before a California defendant may be sentenced to death, he must be convicted of first degree murder and at least one special circumstance must be found true beyond a reasonable doubt. Cal. Pen. Code § 190.1. "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." *People v. Bittaker*, 48 Cal.3d 1046, 1102, 259 Cal.Rptr. 630, 662 (1989). At the penalty phase the jury takes into account any of eleven statutory factors, if relevant, as well as any non-statutory mitigating evidence presented by the defendant. Pen. Code § 190.3. If the jury concludes that the aggravating factors outweigh the mitigating factors, it "shall" return a sentence of death. If it finds that mitigation outweighs aggravation, it returns a sentence of life in prison without parole. Pen. Code § 190.3; *see Boyde v. California*, 494 U.S. 370 (1990).

Unlike the aggravating factors which a Mississippi jury must find in order to impose death, the special circumstance findings in California have no independent significance with respect to determining an appropriate penalty. Rather, the jury may consider them under section 190.3(a), which refers to the circumstances of the present crime and any special circumstances found to be true. Thus, special circumstances do not have the same significance in California's statutory scheme that aggravating factors have under Mississippi law. The California Supreme Court does not view the jury's consideration of erroneous special circumstances to be reversible per se, because the evidence supporting an

erroneous special circumstance can be considered, although the "finding" of an erroneous special circumstance may not. Rather, it applies a harmless error analysis[2/] to determine what, if any, effect the invalid circumstances had on the jury. Where no additional evidence was admitted to prove the special circumstances and the prosecutor did not inflate their significance in the weighing process, the court has "consistently found" such error to be harmless. *People v. Jones*, 53 Cal.3d 1115, 1149, 282 Cal.Rptr. 465, 486 (1991); *see also, e.g.*, *People v. Howard*, 1 Cal.4th 1132, 1180-1181, 5 Cal.Rptr.2d 268, 306 (1992); *People v. Pinholster*, 1 Cal.4th 865, 955, 4 Cal.Rptr.2d 765, 811-812 (1992); *People v. Kelly*, 1 Cal.4th 495, 551, 3 Cal.Rptr.2d 677, 709-710 (1992); *People v. Hayes*, 52 Cal.3d 577, 644, 276 Cal.Rptr. 874, 916 (1990).

In petitioner's case the state court followed its usual practice and examined the significance of the two reversed financial gain circumstances and the one reversed multiple murder circumstance on the jury's penalty determination. It found that the prosecutor emphasized the underlying facts, not the circumstances themselves,[3/]

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2. The court examines errors of state law in the penalty phase under a "reasonable possibility" test. *People v. Brown*, 46 Cal.3d 432, 448, 250 Cal.Rptr. 604, 614-615 (1988). That test, and the "beyond a reasonable doubt" test required for federal constitutional errors, "are the same in substance and effect." *People v. Ashmus*, 54 Cal.3d 932, 965, 2 Cal.Rptr.2d 112, 129 (1991).

3. The record clearly supports this conclusion. The prosecutor admonished the jurors not to put "undue emphasis" on the number of special circumstances it had found. Rather, all eight circumstances really "boiled down" to findings that petitioner murdered for financial or material gain and that he killed two people. 55 RT 3850-3851.

and thus held that petitioner could not have been prejudiced. 54 Cal.3d at 703, 286 Cal.Rptr. at 851. This analysis is entirely consistent with state law as explicated by the California Supreme Court, an explanation which is binding on federal courts, *Stringer*, 112 S.Ct. at 1139, and demonstrates the California Supreme Court's concern that, despite any error, the defendant received "a fair and untainted penalty trial." *People v. Kelly*, *supra*, 1 Cal.4th at 551, 3 Cal.Rptr.2d at 710.

The same conclusion applies to the admission of improper aggravating evidence. The prosecutor introduced testimony from two of petitioner's former wives. On appeal the California Supreme Court concluded that the evidence was inadmissible solely because the defense had not received the notice required by Penal Code section 190.3. Applying the "reasonable possibility" test for state harmless error, the court found that the testimony of the two witnesses, described by the prosecutor as "[v]ery minimal," 55 RT 3870, "brought no appreciable weight to the balance of aggravation and mitigation." Its erroneous

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Contrary to petitioner's assertion, the prosecutor did not assert that there were "'10 or 11' aggravating circumstances." Pet. at 17. Rather, he said "there are about 10 or 11 things that are specified in the judge's instructions and actually, many more things that you can consider in terms of the defendant's background in deciding whether or not mitigating factors outweigh those that are aggravating, or aggravating factors outweigh those that are mitigating." 55 RT 3849. There are "11 statutory factors," *Boyde v. California*, *supra*, 494 U.S. at 378, and the prosecutor was clearly referring to everything the jury could consider in reaching its verdict.

admission was harmless. 54 Cal.3d at 684, 286 Cal.Rptr. at 839.[4]

The California Supreme Court has acknowledged the responsibility imposed by this Court to state when it has undertaken a harmless error analysis. *People v. Mincey*, 2 Cal.4th 408, 480 (1992) (*citing Parker v. Dugger*, 111 S.Ct. 731, 738 (1991), a case upon which *Sochor* is based). The opinion in this case contains "explicit language signifying" that the state court undertook a harmless error analysis. *Sochor*, 60 LW at 4489. It thus fully complies with the requirements of *Stringer*.[5]

II.

THIS COURT LACKS JURISDICTION TO REVIEW THE CALIFORNIA SUPREME COURT'S DETERMINATION OF STATE PROCEDURAL DEFAULTS.

Petitioner challenged the trial court's denial of his motion to suppress statements made to the police while he was being extradited from Japan. The California Supreme Court rejected all of the claims on the merits

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4. The court also found that admission of the evidence did not implicate any federal constitutional rights and found that several other arguments were procedurally defaulted. 54 Cal.3d at 685, 286 Cal.Rptr. at 839-840.

5. In addition, it is clear that the state court explained the basis for its decision, thus answering the concerns expressed in Justice O'Connor's concurring opinion in *Sochor*, 60 LW at 4489-4490.

except for petitioner's assertion that the statement was obtained in violation of his Sixth Amendment right to counsel. The court found that claim to be procedurally defaulted under state law because it was not raised at trial. *People v. Mickey*, 54 Cal.3d at 653, n. 5, 286 Cal.Rptr. at 818, n. 5. Similarly, the state court rejected on procedural grounds a Sixth Amendment Confrontation Clause attack on the testimony of an expert witness introduced in rebuttal at the penalty phase. 54 Cal.3d at 689, n. 16, 286 Cal.Rptr. at 842, n. 16.

In a petition for rehearing, petitioner argued that the supreme court had violated California Government Code section 68081, which provides that if a reviewing court decides a case on the basis of an issue not raised or briefed by the parties, it must allow the parties an opportunity to present their views on the matter. If such an opportunity was not granted, a timely petition for rehearing shall be granted. Because the state did not raise a procedural bar to either of the above claims, petitioner requested a rehearing on the basis of section 68081. The California Supreme Court denied rehearing. Petitioner contends that it failure to comply with state law violated his Due Process rights under the Fourteenth Amendment. His claim is without merit.

This Court emphasized in *Sochor v. Florida*, 60 LW at 4487 that it "lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground," such as a state procedural default. Petitioner asserts that the procedural defaults in this case were not adequate and independent because they were asserted by the court rather than opposing counsel, and

when combined with denial of his petition for rehearing violated state law. The determination of state law is, however, a state issue which federal courts may not reexamine. *Clemons v. Mississippi*, 494 U.S. at 747 (distinguishing *Hicks v. Oklahoma*, 447 U.S. 343 (1980)); *Estelle v. McGuire*, 112 S.Ct. 475, 480 (1991).

The California Supreme Court has, in other cases, raised the question of procedural defaults "*[e]x proprio mutu*." *People v. Gordon*, 50 Cal.3d 1223, 1250 (1990) (finding record was adequate to decide the issue). As the Court explained in petitioner's case, state law precludes an appellant from raising issues on appeal which were not presented in the same form to the trial court. 54 Cal.3d at 653, n. 5, 286 Cal.Rptr. at 818, n. 5. Regardless of whether the state raises the default, the court must ultimately decide whether an adequate objection was made at trial. The California Supreme Court's denial of rehearing must be viewed as an implicit determination that Government Code section 68081 does not prevent it from independently rejecting claims because they were not preserved in the trial court. Petitioner demonstrates no reason for this Court to reexamine that state law determination.

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CONCLUSION

For the reasons stated above, respondents respectfully submit that the petition for writ of certiorari should be denied.

Dated: June 16, 1992.

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